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## The route more travelled: 2 Travel obtains damages in UK

Matthew Hall examines the first occasion when a UK court has awarded damages for a competition law infringement at the end of a full trial



### **Matthew Hall**

Matthew Hall is a partner at McGuireWoods in Brussels, whose practice focusses on all aspects of EU and UK competition law. He has substantial experience with merger control, state aid, cartels and issues arising out of trading agreements and practices, such as abuse of dominance, distribution and agreements between competitors. He advises main parties and third-party complainants, and he has regular dealings with the European Commission and other government bodies and regulators.

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# THE ROUTE MORE TRAVELLED: 2 TRAVEL OBTAINS DAMAGES IN UK

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The sum awarded was far from eye-catching, but on 5 July 2012 a significant competition law judgment was handed down in the UK.<sup>1</sup> The Competition Appeal Tribunal (CAT) awarded 94,000 pounds plus interest to 2 Travel as damages in an action against Cardiff Bus. The claim was based on a 2008 finding by the UK Office of Fair Trading (OFT) that Cardiff Bus had abused a dominant position in local bus services in the UK.

This marks the first time that damages have been obtained from a UK court for a competition law infringement at the end of a full trial.<sup>2</sup> This is significant in itself, but the case is also of particular importance for a number of reasons:

- it confirms how compensatory damages for a competition law infringement should be made out before a court in the UK;
- it provides a roadmap to the award of exemplary (punitive) damages in such a case;
- it shows the significance of an award of interest; and
- it shows the need for the reforms proposed by the UK government in its recent consultation on promoting competition law private actions.

**Cardiff Bus found to have acted abusively, but is not fined**

2 Travel's claim was a "follow-on" action arising out of a 2008 decision by the OFT. The OFT found that Cardiff Bus had

abused a dominant position in the local bus market in Cardiff, contrary to UK competition law.<sup>3</sup>

The market in which Cardiff Bus was held to be dominant by the OFT was essentially the provision of local bus services in Cardiff. Cardiff Bus abused its dominant position by launching and then operating its "White Service" with an exclusionary and predatory intent.

The White Service was a no-frills bus service launched as a response to 2 Travel's entry into the market with a new no-frills bus service. It ran on the same routes and at similar times of day as 2 Travel's no-frills services, and was run at a loss until shortly after 2 Travel exited from the market on 17 December 2004, when Cardiff Bus withdrew the service.

Cardiff Bus claimed that it had introduced the White Service in reaction to 2 Travel's introduction of its no-frills services and with the intention of market-testing the concept. Cardiff Bus also claimed that its decision to withdraw the White Service was taken on the basis of an unexpected lack of customer demand, as well as driver shortages. The OFT disagreed, concluding that Cardiff Bus was reacting to 2 Travel's entry by attempting to force it to retreat from the market. The conduct was predatory and an abuse of Cardiff Bus's dominant position.

However, since its turnover was less than 50 million pounds, Cardiff Bus benefited from immunity from a fine under UK law. Cardiff Bus, despite the finding of the OFT that it had abused its dominant position, therefore appeared to have escaped scot-free.

## 2 Travel seeks damages from Cardiff Bus

2 Travel had other ideas. It filed a claim for damages with the CAT in January 2011, relying on the OFT's 2008 decision. 2 Travel claimed compensatory damages<sup>4</sup> under various heads. It also claimed exemplary (punitive) damages, interest on the damages awarded and its legal costs.<sup>5</sup>

As a follow-on action, the CAT was bound by the OFT's findings as to Cardiff Bus's infringement of competition law. For the compensatory damages element of the claim, all that the court was therefore concerned with was whether the infringement had caused 2 Travel's loss (causation) and, if so, with quantification of 2 Travel's loss.

## CAT confirms the framework for calculating competition law compensatory damages in the UK

The question of how to calculate compensatory damages for a competition law infringement before a UK court is reasonably clear. Further, the case concerned an abuse of dominance potentially affecting only one party and dealt with no particularly complicated issues. Nevertheless, the analysis is very useful as it confirms the framework for future claims in competition law cases of all types.

In analysing the claim for compensatory damages, the first issue was the test to use for causation. The CAT confirmed that the standard "but for" test for causation should be used. This meant that it needed to compare the position in the "real world" (in which the infringement by Cardiff Bus occurred) with the position that would have existed in the counterfactual or "but-for" world (in which there had been no infringement). To the extent that 2 Travel was worse off in the real world than it would have been in the "but-for" world, such losses would be treated as having been caused by the infringement.

The next issue was therefore to identify the "but-for" scenario. The CAT took the view, unsurprisingly, that in this world some passengers that travelled on the Cardiff Bus White Services would have travelled on 2 Travel's no-frills services instead. The CAT calculated the number of passengers as 41,255, who would have generated revenue for 2 Travel of 33,818.79 pounds.

This was the only difference between the "but-for" world and the real world. In particular, in the "but-for" world, 2 Travel would anyway, as it did, have ceased operations in Cardiff on 17 December 2004. The additional revenue of some 34,000 pounds that it would have earned was "a drop in the ocean," and it could therefore not recover anything for the total loss of

its business as a going concern. It would have failed anyway. Further, 2 Travel would have anyway had to sell its interest in a depot (instead of developing it), the abuse did not cause any abnormal waste of staff or management time and its costs of liquidation would have been incurred anyway.

The amount of compensatory damages awarded was therefore low, covering only the loss of revenue (there was no deduction for the costs which 2 Travel would have incurred in generating this revenue, since the buses on which these additional passengers would have travelled had anyway been operated). Nevertheless, even this was a huge victory for 2 Travel.

## A roadmap for exemplary damages in the UK and an encouragement for future competition damages claims

Turning from the analysis of compensatory damages, the CAT considered the claim for exemplary damages. An award of exemplary damages is highly unusual in any branch of UK law,<sup>6</sup> so the successful claim for this type of damage by 2 Travel was very significant.

**The calculation of compensatory damages for a competition law infringement before a UK court is reasonably clear**

The CAT explained that, while the purpose of an award of compensatory damages is to compensate a claimant's loss, the object of any additional exemplary damages is "to punish and deter." There have traditionally been three categories of case in which an award of exemplary damages may be considered appropriate:

- where there has been oppressive, arbitrary or unconstitutional conduct by "servants of the government";
- where the party engaged in conduct calculated to make a profit that may well exceed the compensation payable to the claimant;
- in situations authorised by law.

In 2 Travel's view, the first two of these categories applied. The CAT dealt very quickly with the relevance of the first category: Cardiff Bus, although owned by the local authority, was clearly operated at arms's length from it and had not exercised governmental functions of any sort when operating its White Services.

Analysing the second category, the CAT first considered the relevance of fines for competition law infringements. The CAT took the view that exemplary damages would not be appropriate where the party being sued had been fined by a competition law regulator (or would have been fined but benefited from immunity under a cartel leniency programme). Cardiff Bus had, as noted, not been fined, so exemplary damages could in principle be awarded against it.

Concerning behaviour that might fall within the second category, the CAT held that, in competition cases, if the party is aware that its conduct is either “probably unlawful” or “clearly unlawful,” then the category can in principle be relevant. This, it appears to have been assumed, would usually be the situation in cartel cases.

It was also found to be the situation in the present case. The CAT found Cardiff Bus’s behaviour to be that of an organisation which had deliberately decided to disregard the law, in “cynical disregard” of 2 Travel’s rights. It acted in “knowing disregard” of an appreciated and unacceptable risk that the prohibition on abuse of dominance was either probably or clearly being breached, or it deliberately closed its mind to that risk. Its conduct had therefore been “outrageous” and an award of exemplary damages should be made. This was set at 60,000 pounds (interest was not awarded).

The amount was small, but the fact of the award itself is nevertheless of great importance. The court, recognising this, specifically commented:

*“We are under no illusions that this judgment is likely to incentivise the bringing of claims for exemplary damages in competition cases.”*

This could as easily read: *“incentivise the bringing of claims in competition cases.”* After all, private antitrust claims are big business in the US and the European Commission has observed:<sup>7</sup>

*“[The US class action] system contains strong economic incentives for parties to bring a case to court even if, on the merits, it is not necessarily well founded. These incentives are the result of a combination of several factors, [including] the availability of punitive damages...”*

**The importance of interest**

The judgment also provides a reminder of the crucial importance of interest in these cases. The CAT awarded interest to 2 Travel on the damages it won for loss of profits, setting this at two percent above the Bank of England’s base rate at the relevant time.

As at the date of the judgment, the total compensatory award was therefore just over 50,000 pounds,<sup>8</sup> meaning that the addition of interest to the basic compensatory award increased it by very nearly 50 percent at that time. The court has a discretion to award interest and the CAT had no difficulty in doing so on the loss of profits, since this was money which 2 Travel should have had.

By contrast, an interest award on the exemplary damages award

was not appropriate, since this was not 2 Travel’s rightful cash in the first place, but pure punishment for Cardiff Bus.

**The case shows the need for reforms to promote private actions in competition law in the UK**

The UK government has long sought to promote competition law private actions of all types. Indeed, the 2 Travel judgment came out during the consultation period on a document published by the UK Department for Business, Innovation & Skills (BIS) on precisely this subject.<sup>9</sup> This document sets out a parallel, but independent, process to that being taken forward by the European Commission on the same topic.

One of the proposals of BIS is to “make it easier for businesses, especially SMEs (small and medium-sized enterprises), to challenge anticompetitive behaviour that is harming them.” This would include allowing cases to be brought before the CAT even when they have not first been investigated by the OFT, allowing the CAT to grant injunctions

and introducing a fast-track procedure for SMEs that will allow simpler cases to be dealt with much more quickly and cheaply. The fast-track procedure would “primarily focus on providing fast access to injunctive relief in order to alleviate the immediate pressure on the SME caused by anticompetitive conduct,” which is seen as particularly necessary in abuse of dominance cases.

Although a success for 2 Travel, in that it was awarded damages, the case demonstrates the need for these reforms, and in particular the need for the fast-track procedure for injunctions in abuse of dominance cases. 2 Travel first approached the OFT with a complaint about Cardiff Bus’s behaviour in April 2004 and submitted a detailed complaint in November that year. However, within one month, 2 Travel ceased operations in Cardiff and in May 2005 the company went into liquidation (a type of bankruptcy procedure). The OFT’s decision finding an abuse of dominance by Cardiff Bus was taken in November 2008, fully four years after the formal complaint.

The CAT took the view that 2 Travel would have gone out of business even without Cardiff Bus’s abuse of dominance, but it is likely that, if the issue had been of greater financial significance to it, 2 Travel could anyway not have relied on the OFT to protect it and therefore, ultimately, passengers. The threshold test – which must be satisfied before the OFT can consider issuing directions on an interim (preliminary) basis to a company to stop a competition law infringement – is difficult to satisfy.<sup>10</sup> In any event, the OFT has been extremely unwilling to make interim directions; it has only ever done so in one case, back in 2006.

**The CAT found Cardiff Bus’s behaviour to be that of an organisation which had deliberately decided to disregard the law**

The proposed fast-track procedure would, as noted, primarily focus on providing speedy injunctive relief in order to protect SMEs from anticompetitive conduct, particularly abuse of dominance. 2 Travel was fighting fires on many fronts, and Cardiff Bus’s abusive behaviour did not bring it down, but it is not difficult to envisage a similar situation where the lack of an interim measures direction from the OFT could make all the difference to a company. It is clear that this part of the reform, although controversial, is needed.

**Conclusion**

The 2 Travel case is of great significance simply because of the award of damages for a competition law infringement. It demonstrates to potential claimants that it is possible to succeed in such a case, although the courts will look at the facts in great detail.

At a more micro level, while recognising that other types of claims (such as cartel damages claims) often raise more difficult issues than the facts of this case, the case is important because it provides a good reminder of the framework to be used for demonstrating and calculating compensatory damages in competition law cases. Even more importantly, it provides the first precedent for the award of exemplary damages in a

competition law case. Indeed, as recognised by the court, the award of exemplary damages in this case is likely to incentivise potential claimants in other cases.

Although the timing was purely coincidental, the judgment was handed down during the consultation period on the UK government’s proposals to increase the number of competition law private actions in the UK. These proposals are far-reaching, but it has been questioned whether they will have much of an impact. A consideration of the facts of the 2 Travel case show that it could easily have been one in which proposals in the consultation concerning a fast-track procedure for SMEs, which is aimed particularly at companies needing injunctive relief in abuse of dominance cases, might have had a significant impact.

The law and practice of competition law private actions remains, even today, a developing and difficult area in the UK. The 2 Travel case is clearly an important milestone on the route towards a working system. ■

*Matthew Hall is a partner at McGuireWoods in Brussels. The views expressed in this article are personal to the author and do not reflect the view of McGuireWoods or any of its clients.*

**Footnotes**

- 1 2 Travel Group plc (in liquidation) and Cardiff City Transport Services Limited (trading as Cardiff Bus) [2012] CAT 19.
- 2 Settlements (often substantial) outside the court process have been agreed on a number of occasions in the UK. So far as concerns court cases, in 2004, the Court of Appeal awarded 131,336 pounds in damages to Mr. Crehan for an infringement of competition law by Intreprenuer Pub Company arising out of a beer tie agreement. On appeal, the House of Lords found that there had been no infringement of competition law, so ultimately no damages were awarded. In 2006, the CAT awarded two million pounds as an interim payment to Healthcare at Home in relation to its follow-on claim against Genzyme for abuse of a dominant position. The Genzyme case was subsequently settled.
- 3 The technical finding was of an infringement of the “Chapter II” prohibition contained in Section 18 of the UK Competition Act 1998, which is the UK equivalent of Article 102 of the Treaty on the Functioning of the European Union (the basic prohibition of abuse of a dominant position in the EU).
- 4 Damages in the UK for a breach of competition law are usually only available on a compensatory, rather than a restitutionary, basis. Restitutionary awards base damages on the gain made by the infringer rather than the loss suffered by the victim and are only available in exceptional cases where compensatory damages would not be an adequate remedy.

- 5 The judgment does not deal with costs, which will be covered in the CAT’s formal order setting out the effect of the judgment. This will be produced once the calculation of interest due has been made.
- 6 Devenish Nutrition Ltd v Sanofi-Aventis SA [2007] EWHC 2394 is the only decided UK case dealing with the award of exemplary damages for breaches of competition law. This was not a case concerning the Chapter II prohibition, but an infringement of Article 101 TFEU (the basic EU-level prohibition of anticompetitive agreements). In that case, it was accepted that exemplary damages could in principle be awarded but, ultimately, there was no such award since fines had separately been imposed by the European Commission.
- 7 European Commission, “Towards a Coherent European Approach to Collective Redress,” SEC(2011)173 final.
- 8 Using the Scottish Law Commission compound interest calculator, available at: <http://www.scotlawcom.gov.uk/publications/discussion-papers-and-consultative-memoranda/compound-interest-calculator/>.
- 9 UK Department for Business, Innovation & Skills, “Private Actions in Competition Law: A Consultation on Options for Reform,” April 2012.
- 10 Clause 35 of proposed new UK legislation, the Enterprise and Regulatory Reform Bill, would, if enacted, lower the threshold which determines when interim measures can be imposed.